No. 344. 84.
Sup. Ct. Br. of Carter & Ledyard for Appellees.

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Supreme Court of the United States.

Filed Feb. 25, 1898.

THE UNITED STATES,

Appellant,

vs.

THE JOINT TRAFFIC ASSOCIATION

ET AL.

344.

Some Propositions Embracing Part of the Main Brief of the Appellees.

The brief of the Joint Traffic Association is designed to present a full consideration of the questions respecting the effect of competition upon trade and commerce, and to show when, and how far, such competition is useful, and should be encouraged, and when mischievous, and should be repressed.

The question of competition in *railway* transportation is treated of as *part* of the general question.

Further study and reflection, however, has satisfied the undersigned that the question of competition in railroad *rates* is a question by *itself*, turning upon considerations wholly peculiar to it, and unaffected by those arguments which bear upon the general question of restraints upon trade.

If this be so, the main question in this cause may be presented and argued by a very few propositions, confined within a very narrow range. A statement of these is herein made.

If they are in any respect novel, it is for the reason that the sharp question of the legitimacy of permanent competition in railway *rates* has never, heretofore, been so made in this country as to challenge thorough investigation.

It will be observed that the propositions relate only to competition in *rates*, and not at all to competition in railway *construction*, or in the *character of the service*.

First Point.—Railways are public highways, to furnish which is one of the chief purposes for which governments are instituted; and were there no other way of furnishing such facilities, it would be the duty of government to establish and operate them. In other words, the furnishing of railway transportation is a *governmental function*.

1. The above proposition will probably not be disputed. It seems almost self-evident. All mere theorists agree to it.

2. The very circumstance that such transportation requires a governmental *franchise* proves it. It requires, indeed, two such franchises, (1) the taking of private property; (2) the taking of tolls.

3. The proposition has been distinctly affirmed in this Court.

Second Point.—If government had retained to itself the actual exercise of this function, the charges imposed by it for performing the service would necessarily, be *uniform*. Any departure whatever from uniformity would be not simply a mistake, but an atrocious wrong.

1. To permit one man to have access to, or from,

the market for his products, or supplies, on better terms than those exacted from another (which is the very meaning of competition in *rates*), would involve the enrichment of one citizen and the impoverishment of another, by the direct action of the government common to both.

2. The Interstate Commerce Law itself affirms this necessity of uniform rates. Its principal provisions require the publication of rates, and make the charge of greater, or *less*, rates than those published a crime.

Third Point.—Governments generally entrust, and and our governments have universally entrusted, the discharge of this function to private individuals or corporations; but this does not affect the necessary requisites of a beneficial discharge of the function. Those requisites *are attached to to the function itself*, and do not depend upon the personality by which it is discharged.

1. If, under a private operation of railways, one citizen is allowed to have an advantage over another, not arising from difference of circumstances and situation, the inequality is still an injustice with which the government is properly chargeable. If this inequality were a necessary consequence of entrusting the function to private agencies, such a delegation should never have been made, and should be recalled.

Fourth.—The policy which has entrusted the discharge of this function to private agencies has indeed permitted the *possibility* of a departure from uniformity in rates. These private agencies will necessarily embrace many distinct ownerships, and such ownerships may engage in a competition

in rates. Such departure, however, will be but occasional and temporary. Uniformity in rates is not only a requisite of railway transportation, but also one of its *natural laws* which will enforce itself.

1. The destruction of uniformity in rates brought about by competing ownerships will, unless arrested by agreement among the rivals, speedily result in the extinction of every rival except the most powerful, and uniformity is thus vindicated and restored.

2. This, however, would rarely, if ever, take place. No rivals will make the sacrifice which would thus be necessary, so long as they could save themselves from the inevitable consequences of protracted war by a treaty of peace.

3. The rivals who are able to agree (and this of course includes those only who are able to keep agreements) will agree. They must be included in any treaty of peace, for they are able to fight. If there are any so weak that their necessities compel them to violate their agreements, they are not *sui potentes*, and ought not to exist; in other words they are operating roads for the support of which there is not sufficient business.

4. The foregoing assertion that uniformity of rates under private ownership will enforce itself may be said to rest upon *a priori* reasoning; this is no objection to it if it be so. But the universal *fact* fully vindicates it. Ownerships, the world over, generally *are* private, but uniformity in rates *secured by agreement* is the general rule. Even in this country, where the conditions are peculiar (by reason of the uni-

versal permission to construct roads and the numerous consequent weak enterprises), the *rule* is uniformity. This uniformity is indeed too often broken up, either by fraudulent and concealed breaches of agreement, or by open war. These will become less and less as the systems become strengthened and solidified, but, as it is, uniformity is the *rule*, and difference the *exception*.

Fifth Point.—Any suggestion, therefore, that an agreement between *competing* railroads for the purpose of bringing about uniformity in rates is a *restraint upon trade*, is, therefore, erroneous on its face. Uniformity, producible only by agreement, is the necessary condition for the prosperity of all trade.

Sixth Point.—There is one condition under which, if government itself performed the function, a slight departure from uniformity in rates might be tolerated, and even be expedient. It would be where it was expedient to establish and maintain a line for the support of which there was not sufficient business.

There would be two ways of doing this. (1). By paying the deficiency out of other governmental resources derived from taxation. (2). By diverting to the weak road unrented traffic, or allowing it to carry at a moderately less rate, and thus divert towards it traffic which it would not otherwise receive.

1. But this is not a *real* departure from uniformity. Uniformity does not mean the *same* rates, but rates measured by the *same* rules. Where circumstances are different, a corresponding difference in rates may be indulged.

2. This happens to be the precise resort employed in the Joint Traffic agreement. That agreement follows strictly the natural method.

Seventh Point.—Any suggestions of possible mischief in permitting private owners to agree upon uniform rates would be quite unfounded. They will not do what it is not for their interest to do. Railroads can find prosperity only in the prosperity of the interests they serve. The imposition of any excess in rates can never be practiced without diminishing the volume of transportation to such an extent as to overbalance any increase in profit.

1. It may be objected that the above proposition rests, after all, upon theory upon which it would be unsafe wholly to rely.

   But what does the counter proposition, namely, that there is an *apparent* advantage in the larger rate which may be immediately secured upon the volume of business actually in sight, and that this will be seized, rest upon? Upon theory, also, and upon theory alone. Let, then, the question be determined by an appeal to the actual fact. The history of railroad transportation in this country and in Europe is an open book, and where can a single instance be found in it, of magnitude worth mentioning, where *competing* railroad companies have engaged in any agreement or combination whatever, express or implied, for the purpose of, or which resulted in, the exaction of excessive charges?

Eighth Point.—If any competing railroad owners should be so shortsighted as to attempt any such abuse, it could be easily discovered and repressed. If the Anti-Trust Act applies to rail-

roads, that act would be perfectly effective for the purpose.

1. The doctrine that agreements similar in form may have been made for different purposes, or may be used for different purposes and be lawful or unlawful, according to the purpose for which made or used, is familiar in the law.

   Assignments and agreements alleged to be in fraud of creditors are of this character. In a multitude of instances their validity depends upon the *purpose* for which they were entered into; and this purpose is to be ascertained by an inquiry into their framework, their necessary effect, and the circumstances under which they were made.

2. It might be suggested as possible that an agreement between competing railways made only for the purpose of securing uniformity in rates, might subsequently be made the agency for raising rates to an excessive point.

   The statute would be amply sufficient to punish any such attempt. This would be a plain combination or conspiracy such as is condemned by the statute and made subject to the like penalty. And thus all cases would be covered. If any agreement should be originally made for an unlawful purpose it would be itself punishable as an agreement. If innocent at first, but made subsequently a means of accomplishing an unlawful object, the subsequent attempt to accomplish the unlawful object by the parties to the agreement would, of course, be a prohibited combination or conspiracy.

JAMES C. CARTER,
LEWIS CASS LEDYARD,
Of Counsel for Joint Traffic Association.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.

THE UNITED STATES,
Appellant,

vs.

THE JOINT TRAFFIC ASSOCIATION AND OTHERS,
Appellees.

No. 341.

Observations on the Subsequent Argument Submitted by the Solicitor-General Under the Leave Granted Him by the Court.

The learned Solicitor-General has made large use of the opportunity afforded him, and has sought, to a very considerable extent, to construct an argument not made by him upon the oral hearing.

No objection is taken to this by the undersigned; indeed, it is rather welcome, for it sufficiently appeared on the argument that the learned Solicitor General had not entirely anticipated the views upon which the decree appealed from would be supported by the appellees, and was for this reason less prepared to answer them.

Further opportunity having now been afforded to him, the counsel for the appellees have the better

reason for thinking that they have been put in possession, by this further argument of the learned Solicitor General, of all that can be urged in opposition to their own argument.

The undersigned now desire to point out the particulars in which, as it seems to them, this last argument of the Government is a wholly insufficient answer to the propositions upon which the agreement was supported upon the oral argument.

First.—Under his Second head, the learned Solicitor General insists that the argument of Mr. Carter was directed to a discussion *anew* of the questions considered and determined in the Trans-Missouri case; but he makes no attempt to put a different construction upon the opinion of the Court in that case from the one imputed to it by Mr. Carter. The decisions of the Courts, and especially of this Court, are regarded as authority only for what they *consciously* determine; and they consciously determine only those questions which are considered as made and submitted for decision.

There are two questions which might be presented upon agreements of the general character of these railroad agreements:

> 1. Assuming them to embrace a restraint upon trade, but a reasonable restraint only, are they condemned by the statute? In other words, does the statute condemn absolutely every agreement in any way restraining trade, or such only as are unreasonable?
>
> 2. Is the particular agreement in question in restraint of trade at all; that is to say, does it, in terms, *come within the class* of contracts condemned by the statute? No one can say that these two questions are not broadly distinct.
>
> The statement on behalf of the appellees that it was the second question only which the Court

considered and determined in the Trans-Missouri case was founded upon numerous passages in the decision itself, all of which were fully cited.

It was these passages which the learned Solicitor-General should have considered, and he should have shown, if he could show, that they did not import, and indeed, directly declare, that it was the second question alone which was considered and decided.

Second.—Under his Third head, the learned Solicitor-General holds that an agreement may be in restraint of trade without diminishing, reducing or injuring it ; that the public may be injured by an agreement which in fact promotes and increases trade; and he suggests that a monopoly may furnish the community with a product at a less price than it will otherwise be furnished at, and yet be against public policy and a violation of this statute. These views seem very extraordinary. The learned Solicitor-General seems to be of the opinion that any great aggregation of capital, whether owned by a single individual, or by a partnership, or by a corporation, may conduct the business of production on so large a scale and with such consequent economies as to furnish a commodity in much greater abundance and at less cost, and thus bring it within the reach of a much larger number of people, and still be a *monopoly*. This seems very incorrect. The essential element of a monopoly is that one man, or a set of men, have a control over a particular thing, other than that derived from the possession of mere wealth, which enables them to impose, free from competition, the terms upon which others may obtain it. The mode in which public injury is supposed to arise in such a case, is that greater prices are in fact exacted, and, consequently, the trade in the commodity reduced and injured.

If there can be, however, an agreement which does

not reduce, diminish or injure trade, but which yet creates a monopoly and is illegal at common law, or under the statute, for that reason, and the present agreement is of that character, it must be attacked as being a monopoly, and not as being in restraint of trade. It would have been in order, therefore, for the learned Solicitor-General to point out in what respects the agreement in question created, or tended to create, or was ever designed to create, a monopoly. Such a charge would have no foundation whatever. To assert that where everybody is at liberty to build a railroad if they like, an agreement between railroad companies seeking to bring about uniformity of rates, which contains no power whatever to dictate an unreasonable rate, or any other unlawful action, and which does not even attempt to restrict competition, except, at the utmost, for the short period of thirty days, in order to compel competition, when resorted to, to be open and lawful, and which leaves the parties to it in full competition upon all other points except rates, each one being dependent for the amount of its receipts upon its success in attracting traffic from its rivals, seems too obviously unreasonable for serious refutation.

Third.—Under his Third and Fourth heads the learned Solicitor-General embraces a series of observations without any distinct proposition, and therefore leaves nothing to be answered. The tendency, however, of these observations is apparently to the effect that the policy of the law has erected competition in all the pursuits of life into a *supreme good*, and that anything which in any way, or in any degree, tends to restrict it, or supplant it, is mischievous and against the policy of the law. It seems to the undersigned that it would be scarcely possible to make a statement more erroneous that this, the truth being that competition, like the desires or passions of man's nature, is capable both of good and of evil

effects; that so far as respects the former, it is to be encouraged, and as to the latter, restrained, the faculty of reason being bestowed upon man very largely for this purpose.

But who will say, after reflection, that competition in railroad *rates* is an unmixed good, or indeed anything but evil? If there is any meritorious quality which the service of railroad transportation ought to exhibit and which competition in *rates* does not tend to destroy, the undersigned cannot perceive it.

But those who have apprehensions that powerful corporations, or individuals possessing the power which great wealth furnishes, are able to secure enormous and unjust advantages by securing for themselves lower rates of transportation than their weaker rivals, must certainly perceive that there is little except evil which can proceed from competition in railroad rates, and nothing but good from an agreement fairly designed to secure uniformity in rates. Competition in rates is the very field in which great industrial corporations, or other great aggregations of capital engaged in industrial pursuits, have their most advantageous play. They are able to supply the greatest inducements for furnishing, and possess the greatest power in exacting the lowest rates. The superior power of large wealth furnishes many advantages of which no just complaint can be made. The man who, with a large capital, manufactures on a large scale, can procure his materials, his supplies, his labor and his skill on better terms than his weaker rivals; but that he should secure the transportation to, or from, a market of his materials, or his products, upon better terms than others are able to obtain, is a gross injustice which should not be permitted. This injustice is not possible where uniformity in railroard rates is secured, and to bring this about is one of the main purposes of the agreement in question. The object is to fortify and strengthen every member of the association against any temptation or influence proceeding

from powerful shippers to secure for themselves lower rates than are accorded to others.

Fourth.—Under his Fifth head the Solicitor-General makes a show of answering the argument of the appellees, founded upon the ruinous and mischievous effects upon the railroads themselves of competition in railroad rates; but, instead of answering, he really avoids an answer. He points out that competition has like ruinous effects in the other industrial pursuits, and would have it inferred that there is no difference in the cases; but the argument to which he affected to reply insisted upon the broadest differences. It pointed out that competition in ordinary pursuits was *voluntary*, but that in railroad rates, unless it were open to companies to make efforts towards uniformity, competition was *involuntary*, and, unless arrested by some sort of agreement which, according to the pretensions of the appellant, could not be done, would necessarily result in the ruin of all the rivals save the more powerful.

Fifth.—Under his Sixth head the Solicitor-General attempts to point out how restrictions upon competition in railroad rates operate to restrain trade. His suggestion is that competition tends to make lower rates, which it undoubtedly does immediately and directly, and as long as the competition lasts, that is to say, as long as the weaker rival continues to exist. He argues, therefore, that a restriction upon competition, as it prevents a decline in rates, really keeps them at a higher point than that to which they would otherwise go, and thus makes higher rates, which seems to be a fair conclusion.

But we must state the proposition which is implied by this reasoning, and which alone it supports. That proposition is that *low* railroad rates are, in themselves, a public benefit: and *the lower the better*, and

without reference to the fairness, justice and reasonableness of the rates, so that the best condition would be when the rates were reduced to zero. Why does he not venture to formally lay down this, the only, proposition which his argument seems calculated to support?

In employing this proposition he states no qualification; but if he were asked, "Do you really mean that trade, *in general and as a whole*, would be promoted by a competition in railroad rates which would destroy all uniformity and equality, all stability and convenience, deprive the companies of a profit and make the operation of them an expense, involving their necessary deterioration and unfitness to perform the function with which they are entrusted?" he would probably say "No," that he did not mean that trade would be really benefited by a competition which reduced the rates below what was *reasonable*; and thus his argument would amount simply to this: that the imposition of *excessive* railroad charges was an injury to trade, in which he will find no contradiction from us.

Sixth.—Under his Seventh head he assumes to answer the argument that railroad rates should be *stable*, and his answer is two-fold. First, he says that *absolute* stability is impossible. That may be, but is this any reason why it should not be striven for and as much of it as is possible obtained?

His next answer is that the agreement in question does not secure it. To be sure it does not *require* it; if it did require it by binding each company to permanently accept rates established by some external authority, the charge would be made against the companies that they had permanently restricted competition and conferred upon others the power to compel them to exact even unreasonable rates. The companies in framing this agreement sedulously endeavored to avoid any appearance even of illegality. They

took industrious care not to commit to anybody the power to call upon them to do an illegal thing, and to enjoin upon their agents obedience to law, and also took care to leave the companies free to compete if they chose to do so, subject, however, to a temporary restriction necessary to make that competition open and lawful. If uniformity in rates is beneficial as an *end*, surely a well-intended effort towards it cannot restrain trade.

Seventh.—Under his Eighth, Ninth and Tenth heads he refers to an argument advanced by the appellees, and which is deemed by them of predominating weight, namely, that railroads should not be permitted to take sides in the competitions of their patrons, but should stand neutral between them. This argument was illustrated by instancing the case where a manufacturer in Michigan was enjoying a profitable trade with his market in New York and Philadelphia, and paying a certain charge for the shipment of his product, and where a rival in Indiana, by obtaining a better rate from another road to the same market was enabled to undersell the Michigan manufacturer and drive him out of business, a thing which is possible to an enormous extent all over the country wherever there is competition in railroad rates, and which is supposed, probably with truth, to have been productive of the most prodigious wrong.

His first answer to this argument is that the agreement in question has no tendency to prevent such consequences, because the suggested evil arises only from diversities in *local* rates, whereas the agreement in question applies only to rates on competing routes. But this is an error of the learned counsel. The case supposed is one where both manufacturers, although they may be obliged to avail themselves, for a short distance, of some local line, are yet obliged, for the greater part of the transit, to make use of one, or another, of these great competing trunk lines, and it

is the difference in rates over those competing trunk lines which constitutes the great bulk of the whole difference.

The learned counsel fails, we think, to appreciate an argument greatly relied upon by the appellees—an argument which has never heretofore in discussions upon this subject been sufficiently considered, probably for the reason that it has not been adequately, if at all, presented. That argument is founded upon the circumstance that competition in railroad *rates* wherever it obtains, immediately and necessarily allies itself with all the competitions in other industries, and competing railroads are thus made to take sides in all industrial rivalries, where is they ought always to preserve absolute neutrality between them. The nine great through systems finding their western *termini* at Chicago and other points stated in the agreement, and their eastern in the cities of the Atlantic coast, are fed, on the west, by all the great producing interests which lie to the westward. Every manufacturer or farmer dependent upon any one of these lines for reaching a market is at once made a competitor with every other farmer or manufacturer of similar commodities situated in the same vast region no matter where, and seeking the same market by any one of these lines. Under conditions of railway competition any producer dependent upon one of these lines can secure an advantage over a rival dependent upon another if he can get a better rate, and of course he will omit no effort to obtain it. Correspondingly each railroad can increase the amount of traffic making use of its line if it can, by giving advantages to its patrons, help them to triumph over the competitions of those dependent upon another line. One farmer may thus receive five or ten per cent. more profit upon his crop than another who enjoys no better natural advantages and exhibits no more industry or skill, and one manufacturer enjoying no better natural advantages or exhibiting no more

industry or skill than a rival depending upon another road may yet be enabled to crush him. Under a condition of competition in railroad *rates* it is impossible to prevent these wholly improper alliances. It is a principal and daily business of the Joint Traffic Association, under the agreement under discussion, to deal with the multitude of questions which arise under these conditions. When a manufacturer or producer in one part of the country applies to a transportation agent of one of these competing lines to learn what rates he can have and permanently rely upon, the request is at once transmitted to the main office of the Association. Those who have charge of the business of the Association transmit the request to the officers of all competing lines and ask what objections there may be to the rate asked for. If any of these lines receive support from similar industries they at once call upon their patrons and ask what objections they may have, if any, to the rate. They will, of course, answer that if any change is made it must be made generally on all lines, and on equal terms to all. The answers are transmitted to the central office and the problem is there considered and determined in a way which is just to all the railway interests which are represented, and this, of course, secures equality among all the rival shippers. It is in this way that all the industrial interests find their representatives and protectors in the particular railroad which they rely upon, and these railroads secure an equitable adjustment of the problem through the instrumentality of the Joint Traffic Association.

The argument was also employed on behalf of the appellees that the Inter-state Commerce Act itself had, in the most impressive manner, sanctioned and enforced, to the extent of the power of Congress, this principle of uniformity in rates. The learned Solicitor-General under the same head as above mentioned, denies this, but he supports his denial by a reference to no fact except that the Inter-state Commerce Act

abolished the pooling agreement. And from this he infers that the object of Congress was to preserve competition in rates. It is indeed true that pooling agreements were forbidden. Why this was done we do not clearly know, and probably the better opinion is that the prohibition was an error. There were, however, distinct objections to the practice of pooling which did not attach to other agreements or arrangements designed to bring about uniformity in rates; but if the purpose of Congress was to prohibit any restraints upon competition in rates why did it not say so and declare expressly that all agreements restricting, or designed to restrict, competition in rates should be unlawful? But the provision of the Inter-state Commerce Act relied upon by the appellees, as showing Congressional recognition of the importance of uniformity in rates, was that which required all railroads to *publish* their rates, and then prohibited them from charging any greater, or any *less*, rates than those published. This could have been intended for no other than the just purpose of compelling those who exercise the public function of railroad transportation to stand neutral between business rivals. But is it of any greater importance that neutrality on the part of one railroad between its own patrons should be secured, than that a similar neutrality should be preserved by all competing railways upon one or the other of which rival manufacturers, or producers, depend? That a particular railroad company should afford to one of its patrons rates lower than it grants to a rival is at once perceived to be an indefensible wrong. Is it any less a wrong, or less defensible, that one rival in Indiana, dependent upon a particular line to New York, should be able to secure the transportation of his product to market on terms which would enable him to crush a rival situated in Michigan, because that rival depending, not upon the same line, but one parallel and competing with it, was not able to obtain similar rates?

Of course, in saying the *same* rates we do not mean literally, the same rates, notwithstanding differences in the length of the transportation and other natural conditions. Such differences are natural advantages, or disadvantages, which rivals are entitled to enjoy, or compelled to bear. In any scheme of uniformity of rates, such differences are of course taken into account. What is meant by a *lower* rate is a *relatively* lower rate occasioned simply by railroad competition. It may be asked why Congress in the Inter-state Commerce Act did not enact some provision calculated to secure equality between rivals dependent upon different competing lines. The answer is obvious: It could not do so without itself prescribing the rates, and to this there were insuperable obstacles. The constitutional safeguard against the exercise by government of powers of ownership over things it does not own, the inability to prescribe rates for any thing except inter-state commerce, and the utter inability of separating, for such a purpose, inter-state from local traffic, were difficulties which made all consideration of such an effort unnecessary. Congress proceeded as far as it could go, and enacted uniformity to the extent of its power.

The learned counsel under the same heads has asserted that the Inter-state Commerce Act has in effect enacted and secured competition in railroad rates. Nothing is stated in support of this assertion except the circumstance of the abolition of the privilege of pooling, which has been already commented upon. Any assertion that Congress has intended to enact and perpetuate diversity in rates when it was so plainly impressed with the mischiefs arising therefrom, is entirely unfounded.

Eighth.—There is underlying the argument of the learned Solicitor-General all through his discussion, so far as it has been considered, an implied assertion that what the public has a right to in respect of railroads is

such a rate as shall be produced as a result of competition; but this is saying that *reasonable* rates are such as flow from the action of competition; that is to say, that the existing rate is always a reasonable rate, provided it be shown that in respect to any particular business there are competing lines of railroad not bound by any understanding with each other; for if there is an understanding, which is complied with, it is just as effective in repressing competition as the most formal agreement would be; but this is not the language of the law. Common carriers of whatever character are always entitled, and only entitled, to *reasonable* compensation, and that means a reasonable reward for the service which is rendered. This limitation to reasonable compensation arises from the circumstance that the business engaged in is of a public nature. *Railroad* carriers, besides being engaged in the business of a public interest, are actually performing a function of government, and this consideration attaches to them another obligation, not incumbent upon water carriers, or other land carriers, and that is to perform the service *upon equal terms to all*. The assertion of a right on the part of the public to the constant operation between railroads of competition in rates, is to assert that the operation of such competition is a universal good. It were far better described as a universal evil, inconsistent as it is with the existence of any of the fundamental requirements which the performance of this public function ought to exhibit.

Ninth.—Under his Eleventh head the learned Solicitor-General again imputes to Mr. Carter the argument that there should be *absolute* uniformity in railroad rates, a uniformity which would eliminate from consideration all natural advantages or disadvantages. This is an entire misapprehension. Mr. Carter made no such argument. The uniformity contended for by him was the uniformity which respects, preserves and makes allowance for, all natural advantages, a uni-

formity which consists in similar rates under similar circumstances.

Tenth.—Under his Twelfth head the Solicitor-General refers to the legislation of various states prohibiting the consolidation of competing railroads as evidencing a public policy designed to preserve competition in rates. Perhaps there may have been some notion on the part of many legislators, not well informed upon the subject, that competition, even in *rates*, was requisite in order to prevent excessive charges, but this is not the real significance of the legislation referred to. It has a broader and juster foundation. There is a valuable description of railroad competition as well as a mischevious one, and this is competition in *railway construction* and in the *character of the service*. It is impossible in a multitude of instances that one line in one direction should answer all the just public demands. There must be parallel lines, and in some instances many of them. There may be too few for the public wants; this is an evil. There may be too many; and this is another evil. In other countries these questions are dealt with by the legislature, which makes careful inquiry in the case of any proposed new road whether there is a public demand for it. With us the whole matter is left to the results of competition. The assumption is that wherever there is a sufficient business to sustain a road capital will come forward to supply it, and that wherever there is no sufficient demand for one the capital will not be forthcoming. This competitive policy is what is relied upon to furnish enough, and no more than enough, of these public facilities. How well it has answered this purpose may be questioned. There can hardly be a doubt, however, that on the whole there has been an over supply. The other point upon which competition is useful is in the character of the service. It is in a high degree desirable that this should be improved.

It is the natural tendency of every road to improve its facilities, because improvements, as a rule, always bring a sufficient reward through an increase of business. But where parallel lines exist in competition and each road is dependent for the amount of its traffic upon the inducements which it can offer to shippers, the improvement of facilities is vastly stimulated, even though competition in *rates* were superseded by an effective agreement or understanding. It may be said, indeed, that pooling agreements might have some tendency, if there were any assurance of their permanency, to make railroads indifferent to the amount of business they receive, inasmuch as their shares of the whole are fixed. This consideration, however, has but little effect, for all the parties to a pooling agreement know that such agreements are likely to be broken up and they cannot afford to allow any traffic to become, even temporarily diverted, it being the tendency of any diversion to perpetuate itself. Moreover, none are better aware than railroad managers that the entire volume of business is not a fixed quantity, but depends very largely upon the conduct of the railways themselves; the better the facilities which are offered and the more near to the reasonable point the rates are fixed, the larger the aggregate amount of business, and any enlargement of the aggregate amount of course enlarges the shares of the participants, even under a pooling agreement. But any agreement which, like the Joint Traffic agreement, contains no element of pooling, but under which each company receives the entire benefit of all the traffic it obtains, and can increase the amount of its traffic only by offering superior facilities, furnishes the highest competitive stimulus to increase those facilities. It may be said that such increase by the stronger roads might operate to draw traffic from a weak road to such an extent as to call upon the managers for some action, such as is permitted by the agreement, to divert back a part of the traffic thus

taken, in order to enable the weaker road to live. But the active and energetic road cannot be subjected to any advantage on this account. The managers, in forming any notion as to what the equitable share of each competitor in the traffic is, have as their principal guides the actual share which each obtains under a system of uniform rates. To diminish the share of any one because it has succeeded by its diligence in increasing its proportion, would be very far from equitable. It is one of the assumptions of the agreement that all the parties to it have an inherent power to maintain themselves in life by the exercise of reasonable skill and energy. If they fail, by neglect, to make good this assumption, they confess themselves unable to live. No such road has a right to existence and should go into other and better hands, or die a natural death.

Eleventh.—Under the Thirteenth head the learned Solicitor-General seeks to question the distinctions pointed out upon the oral argument on the part of the appellees between the Trans-Missouri agreement and the Joint Traffic agreement. While admitting that so far as any power is given to the managers by the Joint Traffic agreement to fix rates by a recommendation, it is only to fix *reasonable* rates, he asserts that this is true also of the Trans-Missouri agreement. The learned counsel has, in consequence probably of not having the actual agreement in the Trans-Missouri case before him, fallen into an error in this particular. That agreement conferred upon the association an unlimited power to fix rates in the first instance. The authority was not confined to *reasonable* rates. It will be borne in mind that in the case of the Joint Traffic Association the start was made with rates *fixed by each company for itself*, and filed with the Inter-state Commerce Commission, and admitted by the pleadings to be reasonable; and no power was given to the board of managers to make any change in the rates

thus affirmed, or to make any other rule or direction by way of recommendation, except such "as may "be reasonable and just." (Sec. 2.) Moreover, it was declared by Section 3, "The powers conferred "upon the managers shall be so construed and exer- "cised as not to permit violation of the Inter-state "Commerce Act, or any other law applicable to the "premises, or any provision of the charters or laws "applicable to any of the companies parties hereto, "and the managers shall co-operate with the Inter- "state Commerce Commission to secure stability and "uniformity in the rates, fares, charges and rules "established hereunder." Nothing can be clearer than that any attempt on the part of the managers to recommend any unreasonable rate, or to impose any unreasonable or unlawful rule, would be an absolute nullity. It would bind nobody, and each company would be perfectly safe, *under the agreement*, in totally disregarding any such recommendation or rule, and could not be subjected to any fine, punishment or other disadvantage under the agreement. The parties to the Joint Traffic Association were scrupulously careful not to put it in the power of any outside body to require them in any manner to violate any law, or do any unjust or unreasonable thing. On the contrary, the real and declared purpose was to better enable them to conduct their business lawfully and in accordance with the Inter-state Commerce Law and in harmony with the administration of that law.

We do not mean to suggest that there was any *intention* in the case of the Trans-Missouri agreement to violate or evade any law, but it is true that no one of the limitations of power and precautionary provisions above mentioned were contained in it. Without any rates being established by any company itself and filed with the Inter-state Commerce Commission, broad authority was given to the association to establish rates for them without any limitation to

such as were reasonable. The authority was conferred in these words:

> "Sec. 3.—A committee shall be appointed to "establish rates, rules and regulations on the "traffic subject to this agreement, and to con- "sider changes therein, and make rules for the "competition of outside lines. Their conclu- "sions, when unanimous, shall be made effective "when they so order; but if they differ, the "question at issue shall be referred to the man- "agers of the lines parties hereto, and if they "disagree it shall be arbitrated in the manner "provided in Article 7." (As printed in 58 Fed. Rep., 60).

In case any unreasonable rate were in fact fixed, or any unlawful order made, the parties to the Trans-Missouri agreement would still be temporarily bound by it, although they might get rid of it by giving notice of dissent, which would become operative ten days thereafter. How can it be pretended that the two agreements are not most broadly distinguished upon the most material points?

It is true that under the Joint Traffic agreement the companies are bound *temporarily* by a recommendation, and for the period of thirty days, but only by a *valid* recommendation, that is to say, by one *within the power* of the managers to make, and this can only be when it is reasonable and lawful. The reason for this temporary obedience has been fully explained. It lies in the fact that all the members are left *free to compete*, and in order that the competition, if resolved upon, should be *open* and *lawful*, as required by the Inter-state Commerce Act itself, notice of it is necessary for a sufficient length of time to enable the other parties to openly and lawfully change their rates, so as to meet the competition in an open and lawful way.

The Solicitor-General intimates that Mr. Carter's explanation of this provision on the oral argument was that it was designed to give an opportunity to the other members to determine whether they would take steps "to exterminate" the recalcitrant member. Whether Mr. Carter used this particular phrase or not he does not remember, and it is of little importance; no exception is taken to the observation, for if any member should insist upon making ruinous rates, there would be no alternative but to meet them, or to surrender the traffic; in other words, war would be declared, and the result of war, if persisted in, is necessarily the extermination of one of the parties.

Twelfth.—Under his Fourteenth head the learned counsel objects to those provisions of the Joint traffic agreement designed to mitigate the temptations which weak roads are often under to enter upon a mischievous competition, and he intimates that it is wrong to help a weak road by taking from it traffic which would naturally go to a stronger one.

Nothing could be more beneficially contrived than the provisions in this respect of the Joint Traffic agreement. That association recognizes the fact that there is a large number of competing lines all of which have demonstrated their usefulness to the public and their legitimate existence by a long existence in fact. Some of them, however, are under many disadvantages of one description or another which makes competition with their rivals under the *same* rates often difficult. What would Government do if it had constructed and was operating a certain number of parallel lines, the existence of which it deemed necessary for the public interest, and had adopted the policy, which it would necessarily adopt, of uniform rates, and sought to make each line self-supporting, if it found that some one of the lines could not easily sustain the competition with the others owing to disadvantages? It would say "The circumstances are different, and the real

principle of uniformity justifies the carriage by the weak line of traffic at a somewhat less rate, in order to enable it to get more than it would otherwise receive," and would therefore permit such line to carry at a somewhat less rate ; in other words it would allow a *differential*, or appoint soliciting or managing agents, who might use affirmative efforts to obtain shipments without any change of rates, or might divert, to a certain extent, unrouted traffic to the needy line. What possible objection could there be to either of these measures ? They happen to be the very ones sanctioned by this agreement. In the absence of something of this sort the necessary result would be the loss of a useful public facility, useful at all times to local traffic, and at particular times, when there is a pressure of business, to through traffic.

But the question here, as at every step, is, do these provisions restain trade ? Is there less of buying and selling of merchandise, or transportation business, in consequence of them ? The answer must be that they promote trade, for anything that preserves the existence and usefulness of a great public line of transportation is promotive of trade in the highest degree.

Thirteenth.—Under his Fifteenth head the learned Solicitor-General says that the provisions of the Interstate Commerce Law against discrimination and undue preferences may be enforced without suppressing competition ; to which we say, first, as we have said many times, that our agreement does *not* suppress competition ; absolutely not, so far as respects railroad *construction*, or the quality of the *service*, and only in the slightest degree and temporarily, in the case of competition in *rates*. But why does he not tell us how it is possible, under the operation of competition in *rates*, to prevent one line from giving better rates to one set of manufacturers or producers than another competing line gives to another set of rival manufacturers or producers, and show us that such

discrimination is not equally unjust and prejudicial to trade as the discrimination exhibited by one line in favor of some of its patrons and against others? And why does he not say whether, looking to the actual results, shown by experience, of the attempts to enforce the provisions of the Inter-state Commerce Act, so far as they go, in respect to discrimination, those attempts have not been total failures, involving in their train all manner of dishonest and unlawful practices; and whether, if the uniformity in rates aimed at by the present agreement should be brought about in the way it seeks to bring it about, and to the extent that it should be successful in bringing it about, would not, in the most substantial manner, aid in accomplishing the beneficial purposes of the Inter-state Commerce Law? And again we ask whether a *bona fide* agreement, intended to bring about a compliance with the provisions of the Inter-state Commerce Law, and well calculated to secure such compliance, and calling upon the parties to it to do nothing but purely lawful acts, can be regarded as in restraint of trade?

Fourteenth.—Under his Sixteenth head the learned counsel criticizes the suggestion on the part of the appellees that if Congress had intended its restrictions to operate as broadly as is insisted upon by the Government it would have in terms condemned "every contract in *any* restraint of trade." If this were the real suggestion made by counsel for the appellees it was not a very important one. The suggestion intended to be made was that if Congress really intended its prohibition to reach, as the learned counsel maintains, every restraint upon *competition*, why did it not directly prohibit "every agreement in restraint of trade" or *in restraint of competition in business?* Congress has not prohibited restraints upon *competition*, unless they amount to restraints upon trade. The learned counsel will have accomplished something towards the support of this action when he succeeds in

showing what he has not yet attempted, that every restraint upon competition is necessarily a restraint upon trade, or that the particular restraint upon competition contained in this agreement, however slight and apparently useful, is restraint upon trade.

Fifteenth.—Under his Seventeenth head the learned Solicitor-General, as his only answer to the impressive argument of Mr. Phelps on the constitutional question, suggests that the answer is to be found in Mr. Carter's argument pointing out that the construction and operation of railways is a *public function*, from which he seems to think it follows that where Government makes a grant of the franchise it can by law regulate the exercise of it. But if this argument proves anything it proves too much. It would prove that Government might make any regulation which it might in practice adopt, if it retained the franchise in its own hands, and operated the roads. This certainly cannot be contended. Undoubtedly there are *some* regulations which Congress may prescribe, but not *all*, and the question is how far its authority extends. The argument which it was for him to answer was whether, when the Government has granted to another a public franchise, which franchise becomes, by the grant, the *property* of such other, it can prevent the grantee from exercising that ordinary freedom of contract in the use and management of the property which is necessary in order to make the property useful, and in making which the grantee would be protected by the constitutional safeguards in the case of other property.

Sixteenth.—Under his Eighteenth and Nineteenth heads, the learned Solicitor-General makes some observations in reference to remedies against rates unreasonably low and unreasonably high. The pertinency of these observations is not perceived, except so far as respects a suggestion supported by an extract

from the opinion of Mr. Justice Shiras in a case decided in the Circuit Court of the United States for the Northern District of Iowa, that the difficulty of determining what is a reasonable rate should lead to the conclusion that the actual rate *published* by any company and *filed* with the Inter-state Commerce Commission under conditions of free competition, should be taken as the *reasonable* rate, that is to say, that the reasonable rate is always the actual rate which competition has brought about.

This would seem to be a singular conclusion. It proceeds upon the notion that competition in *rates* between railway companies is governed in some respects, or in some degree, by what is *reasonable*, whereas we know to the contrary. Where competition in railway rates is active, the determining consideration is to get the traffic by cutting under the rival, no matter how low he goes. The only question is not what is *reasonable*, but what rate has the rival *in fact given*. Then too, a strong company might determine not to enter upon the competition and might file with the Inter-state Commerce Commission an unreasonably *high* rate, thinking that the profit thus derivable, even on a diminished traffic, had best be accepted rather than engage in a ruinous competition—a determination not likely, indeed, to be reached. Would the shipper under such circumstances be precluded from asserting that the rate was unreasonable? Is *the lowest rate of any competitor* to be regarded as the reasonable one?

If the intended argument be that the difficulty of determining what a reasonable compensation for railroads should be, is so great that it is necessary, or advisable, to abandon the effort and adopt some fixed and arbitrary standard, it cannot be allowed. The making and bringing before courts of questions difficult of determination is the commonest experience in the law; but this does not relieve the tribunals from the necessity of determining them. Whenever justice

requires the determination of a question the determination must be reached. It was once directly declared in a prevailing opinion of this Court, although the question was not necessarily involved, that a legislature could prescribe the rates which a railroad might charge and that its action determined the question of reasonableness. It was soon found that no such doctrine could be adhered to and that any legislation prescribing a destructive rate was invalid. The question of reasonableness of railroad rates was declared to be a *judicial* question and this and other courts have not hesitated to enter upon and determine it, notwithstanding its confessed difficulties. Courts of justice cannot avoid questions on account of their difficulty.

Seventeenth: The foregoing covers the substance of the points made by the learned Solicitor-General in his effort to answer the argument on the part of the appellees. It is, we think, a fair general criticism to make of this effort that it is *desultory*, dealing with *incidents* and *details*, and not attacking *main positions*.

The particular proposition which he was called upon to establish, and the burden of establishing which rests upon the Government, was that this Joint Traffic Agreement is within the class of contracts condemned by the Inter-state Commerce Act, which class is therein clearly defined as contracts "in restraint of trade." The argument designed to show that it was not within this class, and which it was for him to answer, affirmed that the agreement did not restrain trade at all, but was in a high degree promotive of, and indeed necessary to, trade. It embraced these four main positions:

1. It pointed out with detail that the vast business of operating railroads both in conjunction and in competition, constituted a general interest of vital importance to the trade and commerce of the country, which ought to be managed harmoniously and, so far as possible, as a *unity*; that to

this end it needed *organization*, which could be reached only by the establishment and observance of certain rules of uniformity; that Government, either from lack of jurisdiction, or from choice, or from both, had refrained from fully establishing those regulations which would lead to the conduct of the business as a harmonious whole, so as to make it productive of the highest degree of usefulness to the public and to those whose capital was invested in it; that this agreement was in good faith designed, and was, in fact, extremely well calculated, to bring about the harmonious operation on a large scale of this public service in those particulars in which the Government, either from inability or from choice, had refrained from regulating it; and the question was asked whether an attempt in good faith by agreement between those independently engaged in a great industrial pursuit to subject the management of it to rules which would greatly conduce to the advantage of the business itself, and still more to the public interests of trade and commerce, could, by any stretch of the imagination even, be viewed as falling within that description of contracts regarded in the law as in *restraint of trade* and deserving to be made *criminal offenses*.

We do not perceive that the learned Solicitor-General has made any attempt even to meet this position, as it was made in the briefs and upon the oral argument.

2. Another main position was this: The several meritorious requirements which the service of railroad transportation ought to exhibit and without which great mischief and confusion, extremely detrimental to the trade and commerce of the country, would inevitably arise, were enumerated as follows:—

(1) Uniformity in rates.

(2) Stability in rates.

(3) Equality in rates.

(4) Dispatch and safety.

(5) Ease and convenience in shipping effected by classification and publicity.

(6) Reasonable rates.

It was then shown in detail that no one of these merits could be secured in the actual condition in which the business of railroad transportation was situated in this country without an effective agreement (whether formal or informal is of no consequence), substantially similar to the one in question; so that it could be justly said that the agreement was *necessary* to each one of the several requirements mentioned. Very copious extracts were made from the declarations of that body charged by Congress with the superintendence of the railway transportation service, which certainly proved that *concert of action* of this character is necessary for each of these purposes. And *concert of action* means *agreement*; and if *informal* agreement to these ends is useful and unobjectionable, *formal* agreement to the same ends must be more useful, because more effective.

We do not perceive that this necessity of such agreements has, in any one of the particulars mentioned, been controverted. We may therefore again with propriety ask, Is an agreement necessary to *uniformity* in rates, necessary to *stability* in rates, necessary to *equality* in rates, necessary to *dispatch and safety* in transportation, necessary to *ease and convenience in shipping* and necessary to *reasonable rates*, in restraint of trade or commerce? Must it not, on the other hand, be highly promotive of both.

3. The further position was taken that unless such agreements were allowed, one of three alternatives must follow: (1) That all railroad transportation be abandoned; or, (2) The consolidation of all competing railroads under a single ownership, either Governmental or private; or (3) That all competing railroad business must be carried on in constant and daily violation of criminal law; and that as neither of the first two alternatives could be contemplated as possible, the third must necessarily follow.

This position was supported under the Sixth point of the brief of the Joint Traffic Association by what are believed to be pertinent and conclusive reasons. It is not perceived that the learned Solicitor-General in his last effort has successfully controverted it, if indeed he has made any attempt to do so; and we may, therefore, again ask, whether an agreement in good faith designed to enable, and necessary in order to enable, the great business of railway transportation to be carried on without daily violation of the criminal law, can be said to fall within the class of agreements which restrain and injure trade, and are worthy of being made criminal offenses?

4. A further position was taken, which selected one of the above mentioned requirements of railway transportation, namely, *uniformity in rates*, and put it forward as not only necessary to the general efficiency of railway transportation, but necessary in order to save the Government itself from being the instrumentality of the most prodigious and cruel injustice to its own citizens. It was pointed out that railway transportation was not trade or commerce itself, not business itself, in its ordinary sense, but a *service* incidental to other business; a service, too, which it was the

first duty of Government to render: and that if Government had reserved to itself the performance of this service, the first rule which it would have adopted would have been to preserve its own neutrality in the competitive strifes of commerce and industry by establishing uniformity in *rates*, not only for all the patrons of a particular line of railroad, but for all the patrons depending upon parallel lines; that otherwise one producer or manufacturer could get his product or supplies to, or from, a market upon better terms than a rival depending upon the same market by another parallel road, and the Government itself would thus enrich some of its citizens and some places, while it impoverished other citizens and other places.

It was pointed out that the necessity of this uniformity in *rates* did not attach to the particular personality which operated the roads, but attached to the function itself, and was not less manifest when the public function was delegated to private hands than when the exercise of it was reserved to the Government itself. The result of this is that while competition may be very useful, as, up to a certain point, it certainly is, in all the *ordinary* business of life, it has, so far as the *rates imposed* are concerned, no proper place in the exercise of the great public business and function of *railway transportation*

This conclusion seems to follow so directly and unavoidably that confirmation of it drawn from other sources would seem hardly necessary; but in the argument offered by the appellees it was confirmed by pointing out that Congress itself had recognized and secured this uniformity in *rates* to the extent which its powers enabled it to secure it. It was further shown that wherever in the civilized world railway transportation was afforded, the service followed the same natural

law, and uniformity in *rates*, either by the action of the Government itself, or by that of the private individuals exercising the franchise, or by both, was everywhere the rule. It was further shown, as an evidence of the operation of the same natural law, that in this country, from the very commencement of competition in railway service, uniformity of *rates* brought about by agreement, formal or informal, had been the constant aim; that the end had been gained substantially, although with great difficulty, and with great imperfection, owing to the frequent breaches of agreement and consequent introduction of ruinous competition involving rate wars, and that the present effort was only an instance of the further prosecution of the effort, made necessary by the ineffectiveness of prior agreements and the prohibition of pooling, against which it had been supposed, rightly or wrongly, that there were special objections. It was further shown that all apprehensions of exorbitant exaction, or of the creation of monopolies, arising from attempts by agreement to secure uniformity in *rates*, were unfounded, the notorious fact being that nowhere in the world has it ever been known that the privilege of agreement had actually been made use of to effect monopolies, or establish unreasonable rates, and the fact being in this country that, notwithstanding the privilege of agreement, fully availed of, and of undoubted validity, until these recent prosecutions, railroad rates have steadily declined from about three cents a ton per mile to about one-half a cent per ton per mile—a decline not showing that the original rate of three cents was at all unreasonable, but showing the improvement and cheapening of the service effected by competition in the character of the service which is left unchecked by the agreement, and by a full

recognition of the fact on the part of the railway companies that their real interest always lies in increasing the bulk of traffic by reducing the rate to the lowest figure at which business can be fairly done.

It is not perceived that this line of argument has been even attempted to be controverted by this last effort of the learned Solicitor-General, and certainly the effort was not made by him on the oral argument.

Eighteenth.—Reference is made by the Solicitor-General in several places to the views which have been expressed by various courts and judges in relation to the benefits of competition and the evils of monopoly, and also to the public apprehensions upon this score. It is certainly true that such apprehensions are widely entertained, and on the other hand they are quite as widely declared to be without foundation. So far as actual decisions go, the subject is dealt with rather copiously in the brief of the Joint Traffic Association. An apprehension cannot well be refuted. Where there is no fact out of which it can justly arise the imagination may easily create it. It would be unfortunate, indeed, if questions of law depended, in any large degree, upon determining how far, in the absence of actual fact, *apprehensions* were well founded or justified. It seems to the undersigned that before such apprehensions should be taken into account and made the basis of legal conclusions, so far as railroad business is concerned, it might fairly be asked that some instance should be pointed out in which competing railroads have united together to form a monopoly of any sort, or to secure to themselves more than a fair reward for the service rendered. The thing is really impossible. The constant pressure from the patrons of every road upon its managers and officers is for lower rates, even when they know that the lower rates, if given, will be uniform, and furnish them with no

advantage over their rivals. They all think, and rightly think, that the lower they can offer their goods in the market the larger will be the amount taken. They all urge, and rightly urge, that what will be for their interest will also be for the interest of the railroad companies. The formation of a combination to put up rates to a high point, resulting, as it would, in a damaging diminution of traffic, is so entirely unwise for railroads, even from a selfish point of view, that it never will be, as it never has been, upon any important scale, resorted to.

Railroad rates can never escape from the influence of the great competitions of the world. If the Joint Traffic Association were united with all lines of water transportation and had absolute and unchallenged legal power to establish rates at any point, reasonable or unreasonable, for the whole vast region it serves, the great industrial interests of those regions would still be left in competition with like interests in the other parts of the nation, and the railroads which respectively serve the rival interests would be inevitably involved in the strife and be compelled to compete with each other. Any attempt on the part of railroads, united in an agreement for uniform rates and serving a particular region, to burden the interests they serve with high rates would at once cripple those interests and re-act to the ruin of the roads making the attempt. If the union embraced all the railroad and water transportation of the entire nation, a similar attempt would be equally disastrous. The manufacturers and producers of the United States are, and ever must be, competitors with the same classes in all other commercial nations, not only in supplying the wants of the seventy millions of their own people, but in supplying the other great markets of the world; and they will inevitably be crippled in that rivalry by any burden or charge which enhances the cost of any of their products, and the railroads which serve them would be full participants in any disastrous re-

sults which a short-sighted policy on their part would bring about.

There may, indeed, be a possibility, more theoretic than actual, that some two local competing roads might find, or think they had found, some local traffic, the amount of which was so little subject to change, that they might, with advantage to themselves, impose high rates upon it; but the field for such operations is so small, and the possible mischief flowing therefrom so doubtful, and minute in comparison, that the possibility is not worth thinking about as a factor in settling the great conclusions of public policy.

In the opinion pronounced by this Court in the Trans-Missouri case, large allusion was made to the varieties of opinion entertained in courts, in legislative bodies and among the people respecting the benefits and evils of competition. That opinion avoided, and properly avoided, in view of the *form* in which the question was made up and presented, any effort to weigh the differences and determine upon which side the balance fell. It declared, however, that it could not say that Congress had *not* entertainedthe fears and apprehensions referred to when it passed the Anti-Trust Act, and therefore that so long as the argument presented was whether the term *contracts in restraint of trade* included *all* such contracts, or such only as were unreasonable, it could not say that Congress acted upon the narrow interpretation.

Now, however, the question is put in its true shape. Congress has declared *what* contracts it intended to condemn. It is those only which injure trade by restraining it, and the question which it has imposed upon the Court to decide is whether, in any particular case, the particular agreement does restrain trade or commerce. In determing that question the Court is removed beyond the reach of apprehension or clamor of any description, except such as it shall find and determine to be well founded. Its task is to determine

whether this particular contract is in restraint of trade, and in the performance of that task all apprehension and clamor, except such as the Court believes to be founded in *reason and in truth* are wholly irrelevant. If this agreement will, in fact, from its *necessary* operation, restrain trade, it falls within the condemnation of the statute, notwithstanding the just purposes with which it was alleged to have been entered into, for no man can be heard to say that he does not intend the necessary consequence of his acts; but unless this conclusion can be reached the agreement is not open to the attack made upon it.

Lastly.—The learned Solicitor-General has reprinted in the form of an appendix the argument of Mr. Macfarlane in the Court below in support of his assertion that the agreement was a *pooling* contract.

Inasmuch as he made no point in his original brief, or upon the oral argument, that the contract was a pooling one, and was silent when the counsel for the appellees stated to him, on the oral argument, that they supposed that it was not his intention to raise that point, it seems unnecessary to take notice of this extract. The suggestion of the learned counsel is that this extract from Mr. Macfarlane's argument shows that all the objectionable features in pooling agreements are embraced in this contract. But where has he ascertained, and how are we to know, what the *objectionable* features in a pooling contract are? The way in which a *legislature* informs us what it deems to be *objectionable* is by prohibition. It objects to what it prohibits, and does not object to what it does not prohibit. To say, or to intimate, that there is a pooling of freights between railroad companies where each company is left to attract to itself all the business it can, and receives to itself alone the entire compensation for the traffic it carries, would be utterly extravagant. His suggestion, made upon the oral argument, that pooling was the only form of agreement known

among railroad companies at the time of the passage of the Anti-Trust Act is supported by no evidence, and is quite unfounded. Agreements of some sort have existed wherever uniformity of rates was seriously threatened by competition. Pooling was adopted only where other forms of agreement had proved ineffectual.

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